

(1987) 07 BOM CK 0018

In the Bombay High Court

Case No : Appeal No. 738 of 1983 in Writ Petition No. 347 of 1980 (On appeal against 1983 (14) ELT 2177)

Satellite Engineering Ltd. and another APPELLANT

Vs

Union of India and others RESPONDENT

Date of Decision : 08-07-1987

Acts Referred:

Customs Act, 1962 — Section 14

Citation : (1988) 19 ECR 33 : (1987) 31 ELT 356

Hon'ble Judges : V.P. Tipnis, J;S.P. Bharucha, J

Bench : Division Bench

Judgement

Bharucha, J.—The appeal assails the judgment and order of Pendse, J. dismissing the writ petition filed by the appellants.

2. The appellants manufacture fluorescent starter switches. Prior to 1961 a company called Permanand Maneklal & Company was in technical collaboration with M/s. Kupfer Ltd., U.K. (hereinafter referred to as "Kupfer"). On 16th April, 1962 an agreement was entered into where under the business of Permanand Maneklal & Co. was transferred to the appellants. Later Permanand Maneklal & Co. went into voluntary liquidation.

3. On 17th January, 1972 the appellants placed an order with Kupfer for 30 tonnes of lead glass tubing of a certain specification for fluorescent starter switches at the price of pounds 0.075 per pound C.I.F. Bombay (Lead glass tubing of that specification is now referred to as "the said tubing"). The offer was accepted by Kupfer by its letter dated 22nd March, 1972. (The rate of pounds 0.075 per pound works out to pounds 0.15 per Kg.)

4. On 11th March, 1973, the first consignment of the said tubing arrived at Bombay. The appellants filed a bill of entry valuing the said tubing at pounds 0.15 per Kg. On 7th July, 1973 the appellants were called upon by the Customs authorities to show cause why the said tubing should not be confiscated for there

had been a mis-statement in regard to its value. The show cause notice stated that no price list or manufacturer's invoices had been produced to substantiate the correctness of the value. A quotation given by M/s. John Elmore Ltd. (hereinafter referred to as "Elmore") for identical tubing was pounds 0.429 per Kg. and a quotation given by M/s. Chance Brothers Ltd., (hereinafter referred to as "Chance"), who were the manufacturers of the said tubing, was pounds 0.430 per Kg. Copies of the said quotations were enclosed with the show cause notice.

5. On 10th July, 1974 the appellants replied to the show cause notice. They stated that they were not the direct purchasers of the said tubing from Chance and, as such, were not aware of the price at which Chance sold it. The appellants were in technical collaboration with Kupfer who had supplied and would be continuing to supply them with technical information and know-how. Under the collaboration agreement between the appellants and Kupfer, the appellants were committed to Kupfer to import from Kupfer along the raw material required for the manufacture of starter switches. The appellants referred to letters written by Kupfer to Chance asking that Chance deal with them on a preferential basis.

6. On 26th July, 1973 a further reply was given by the appellants to the show cause notice in which reference was made, inter alia, to letters written on 20th July, 1973 and 24th April, 1972. The letter dated 24th April, 1972 was written by M/s. Electronic and Fluorescent Accessories Ltd. (hereinafter referred to as "Electronic") to Kupfer making an offer of 60,000 kilos of the said tubing at the rate of pounds 1.50 per 10 Kg. for export to India. The letter confirmed that the said tubing had been purchased by Electronic from Chance during 1970-71. Thereafter, new specifications regarding the manufacture of fluorescent starter switches for Europe had come into force and Electronic was now using an entirely different material. The tubing being offered was, therefore, of no further use to Electronic and it would assist Electronic greatly if Kupfer would dispose of the same as quickly as possible as Electronic urgently needed the space which the said tubing was taking up in its warehouse. The letter dated 20th July, 1973 addressed by Kupfer to the appellants stated that this was the tubing that was sold to the appellants.

7. On 7th August, 1973 the Collector of Customs passed an order on the show cause notice. The order stated that it had been established that the seller and the buyer of the said tubing had an interest in the business of each other as they were collaborators. Kupfer had obtained the said tubing from one of its associates (Electronic). The associate had sold the said tubing in a stock lot because it was considered to be obsolete due to changes in the accepted specifications. It was clear from these circumstances that the price declared in the invoice of Kupfer to the appellant could not be accepted as the correct value of the said tubing u/s 14 of the Customs Act. The said quotations from Chance and Elmore related to the identical tubing and they agreed very closely with each other. There was a difference of about three months between the shipment of the first consignment and the dates of the said quotations but there was nothing to

suggest that the price had changed. The Collector, therefore, ordered that the said tubing should be re-assessed on the basis of the price of pounds 0.430 per Kg., which was shown by the said quotations. He also confiscated the said tubing but permitted redemption on payment of a fine of Rs. 54,500/-.

8. The second consignment of 164 cases containing 10,030 Kgs. of the tubing arrived at Bombay in May, 1973. A bill of entry in respect thereof was filed by the appellants on 24th May, 1973 valuing the tubing at pounds 0.075 per pound, i.e. pounds 0.15 per Kg. On 7th July, 1973 a show cause notice in terms similar to that first show cause notice was issued to the appellants. The appellants' reply was in similar terms, as was the order of the Collector thereon. He directed reassessment of the said tubing in the second consignment on the basis of the price of pounds 0.430 per Kg. He confiscated the said tubing but permitted its redemption by payment of fine of Rs. 54,500/-.

9. In September, 1973 a third consignment, yet again of 164 cases, of the said tubing was imported by the appellants. On 10th September, 1973 the appellants filed a bill of lading for 8,030 Kgs. at the price of pounds 0.12 per lb. (i.e. pounds 0.25 per Kg.) but declared the higher value of pounds 0.430 per Kg. under protest in view of the proceedings in respect of the first two consignments.

10. On 19th December, 1973 a show cause notice was issued to the appellants which referred not only to the mis-declaration of value as aforesaid but also alleged a mis-declaration of weight. The show cause notice noted that in all the three consignments there were 164 cases but the weight shown in regard to the third consignment was nearly 2 metric tonnes less than the weight shown in regard to the earlier consignments. It had, therefore, been weighted and it was ascertained that the correct weight was 10,037 Kgs. as against 8,030 Kgs. declared in the bill of entry.

11. The appellants replied to the show cause notice on 14th January, 1974. The reply, insofar as it concerned the mis-declaration of value, offers nothing new except as will be noted in dealing with the Collector's order on the third show cause notice. In regard to the allegation of mis-declaration of weight, the appellants stated that they had already explaining in a letter dated 19th November, 1973 the circumstances under which the mistake had occurred. While the third consignment was being examined, the discrepancy in weight was noticed and the appellants had immediately written to their suppliers to investigate into the matter. The suppliers had replied on 26th November, 1973 explaining how the mistake had occurred and had offered the appellants the option to re-ship to them the additional tubing or to retain it on payment of the additional price for which an invoice would be sent. The appellants denied that there had been any wilful mis-statement on their part.

12. The Collector passed an order on the third show cause notice on 24th April, 1974. The Collector noted that by the letter dated 7th November, 1973 to the appellants Chance had certified that their price prior to May, 1972 was pounds

0.340 per Kg. He noted that it had been urged on behalf of the appellants that the inquirers to whom the said quotations had been made by Chance and Elmore should be made available for cross-examination. He stated that even the names of those inquirers had not been disclosed in the public interest, but copies of the said quotations addressed to them had been furnished to the appellants. The Collector accepted the price in the said quotations and ordered that the said tubing in the third consignment be assessed on the basis of the price of pounds 0.430 per Kg. The Collector noted the explanation given by the appellants in regard to the mis-declaration of weight but gave no finding thereon. However, he did order that the re-valuation would include the excess weight of 2,007 Kgs. which had been accepted by the appellants. The Collector confiscated the said tubing in the third consignment but gave the appellants the option to redeem it on payment of a fine of Rs. 33,000/-. He also imposed a penalty of Rs. 27,000/-, which has been found by the appellate and revisional authorities to be in regard to the misdeclaration of weight.

13. The appellants filed appeals in respect of the three orders passed by the Collector on the three show cause notices. The appeals were dismissed on 16th January, 1978 by the Central Board of Excise and Customs.

14. The appellants then preferred revision applications to the Central Government. By its order dated 13/20th October, 1979 the revision applications were disposed of. That Customs duty should be paid on the basis of pounds 0.430 per Kg. was confirmed. In regard to the first and the second consignments, the confiscation orders were set aside and, in regard to the third consignment, the fine in lieu of confiscation was reduced to Rs. 15,000/-. The penalty of Rs. 27,000/- imposed in regard to the third consignment was confirmed. The revisional order noted the argument on behalf of the appellants that the evidence with the Customs authorities was not reliable. It observed that the evidence was that of the said quotations giving the price of goods of the like kind and quality addressed by the manufacturer thereof to independent traders in India. The order rejected the argument that it was necessary to produce these traders for cross-examination. The gist of the quotation had been given to the appellants. The quotations fell within the category in Section 14 of goods offered for sale. As regards the charge of mis-declaration of weight in regard to the third consignment, the order noted that there having been a mis-declaration, the appellants had rendered themselves liable to the penalty.

15. The appellants filed the writ petition impugning the orders of the Collector, the Central Board and the Central Government in regard to the three consignments. The petition was dismissed on 21st August, 1983. The learned single judge noted the said quotations upon which the authorities had relied and the argument that unless the names of the inquiries were declared to the appellants and they were offered for cross-examination it was not possible to establish that the price quoted therein was the correct price. The learned judge noted that the appellants had been made aware of the said quotations. He felt

that it was open to them from this material to establish that the quotations did not represent the correct price. He observed that if the authorities were compelled to produce the inquiries for cross-examination, it would be impossible to gather any material. The learned judge noted also the material upon which the appellants relied. In his view, the letters and certificates that constituted this material had been manoeuvred by the appellants from the exporters to substantiate their claim and the appellants could not draw any strength therefrom. He, therefore, upheld the findings of the authorities in regard to the charge of under-valuation. As regards the charge of mis-declaration of weight, the learned judge said that it was undoubtedly true that the Collector had not specifically found that the appellants' explanation in that behalf was not acceptable, but he felt that there was hardly any doubt that the Collector was not inclined to accept that explanation because he had levied the penalty of Rs. 27,000/- for such mis-declaration. This penalty had been confirmed in appeal and in revision. The learned judge felt that the mere fact that the appellants' explanation had not been assessed in detail and a finding was nor recorded that it was unacceptable was no ground to examine the explanation in the writ proceedings. Assuming that he could re-examine the explanation, he found that the explanation was false and frivolous. He noted that the conduct of the appellants indicated that they had no value for the truth and were willing to procure false evidence to sustain their claim and to evade duty. It was impossible, he said, to rely upon the statement of such persons while considering whether the mis-declaration of weight was by genuine error.

16. Before we deal with the contentions it is necessary to set out the provisions of Section 14(1) and examine the material upon which the appellants and the authorities rely on on the question of the value of the said tubing.

Section 14(1) reads thus :

"For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be

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(a) the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale :

Provided that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented u/s 46 or a shipping bill or bill of export, as the case may be, is presented u/s 50.

(b) Where such price is not ascertainable, the nearest ascertainable equivalent thereof determined in accordance with the rules made in this behalf."

17. The appellants rely in the main upon a certificate dated 7th November, 1973 given by Chance. The certificate confirms that for the said tubing Chance's price for India between the date of the previous increase and May 1972 was pounds 0.340 per Kg. The appellants also rely upon a quotation sent by Chance on 11th December, 1973 to them wherein the price quoted is pounds 0.204 per Kg. for case packing and pounds 0.191 per Kg. for pellet packing.

18. In regard to the said quotations, one was invited by a merchant whose name remains undisclosed to the appellants. On 22nd May, 1973 the merchant introduced himself to Chance as being a manufacturers' representative in India dealing in various lines which he handled on behalf of principals. As some of his customers were interested in importing the said tubing, particulars whereof were attached, he requested Chance to furnish him with the lowest price. In its reply dated 22nd June, 1973 Chance stated that its price for the said tubing was pounds 0.430 per Kg. The other quotation was asked for by a telegram to Elmore. The telegram asked for Chance's lowest price for the said tubing. A reply from Elmore was received on 30th May, 1973. It stated that Chance had been contacted and it had quoted pounds 0.429 per Kg.

19. Customs duty is chargeable on the said tubing on an ad valorem basis. The provisions of Section 14 are, therefore, applicable. An analysis of Section 14(1), already quoted, will be of assistance. Where customs duty is chargeable on an ad valorem basis, the assessable value of the goods is, under clause (a), the price at which the goods or similar goods are ordinarily sold at the relevant time and place, in the course of international trade, but provided that the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale. We are not concerned with the provisions of the proviso. Sub-clause (b) comes into operation where the price is not ascertainable under the terms of clause (a), in which event it is the nearest ascertainable equivalent of such price and is determined in accordance with rules made for the purpose.

20. Mr. Talyarkhan, learned counsel for the appellants, urged that the authorities ought to have accepted as the assessable value of the said tubing the amount of pounds 0.15 per Kg. which was in fact the price paid by the appellants. In this connection, the letter written by Electronic to Kupfer on 24th April, 1972 in relation to the said tubing sold to the appellants is relevant. Electronic stated that the said tubing was considered obsolete by it because new specifications regarding the manufacture of fluorescent starter switches for Europe had come into force and it was now using entirely different material. The stock lot of the said tubing that was being sold was, therefore, of no further use to it and it was necessary to dispose it of as quickly as possible as the space which it was occupying in its warehouse was urgently needed. To the same effect is the letter written by Kupfer to the appellants on 20th July, 1973. Kupfer referred to the price as "a clearance offer". It is apparent from these letters that price was not the sole consideration for the sale of the said tubing to the appellants. The

consideration also was that obsolete material was being removed from a warehouse whose space was urgently required for other purposes. For the present we need not, therefore, deal with the aspect of the interest of the appellants and Kupfer in each other's business. The price paid by the appellants, namely, pounds 0.15 per Kg. cannot, therefore, be considered the proper price for assessment of Customs duty.

21. This brings us to consider the price at which the tubing was offered for sale. Mr. Talyarkhan submitted that the appropriate price in this regard was the price of pounds 0.34 per Kg. that was quoted to the appellants by Chance. The appellants' reply dated 10th July, 1973 to the first show cause notice issued to them is relevant in this regard. The appellants there stated that they were "in technical collaboration with" Kupfer who were manufacturers of starter switches for fluorescent tubes. Kupfer had supplied to the appellants and would continue to supply to them technical know-how and information for the manufacture of such switches. Under the collaboration agreement with Kupfer the appellants were committed to Kupfer for importing raw material from them alone for the manufacture of starter switches. Kupfer had written to Chance asking Chance to deal with the appellants "with preference". Because of their Collaboration with Kupfer, Kupfer and other manufacturers in the United Kingdom protected the appellants' interests. It is clear from this letter that a price quoted to the appellants by Kupfer or Chance or any other manufacturer of raw material in the United Kingdom cannot be accepted, at least without corroboration, as the assessable value of the said tubing for the purposes of Customs duty. There is no corroboration of this price. In fact, the price quoted by Chance to the unnamed inquirer becomes the more credible by reason of the appellants' statements in the communication dated 10th July, 1973. It is obvious that by reason of Kupfer's interest in the appellants' business, Kupfer had prevailed upon Chance to deal preferentially even in the matter of price with the appellants. It is, therefore, not possible to accept the submission that the price of pounds 0.340 per Kg., quoted by Kupfer to the appellants in the letter dated 7th November, 1973, should be accepted as the assessable value of the said tubing for the purposes of section 14.

22. This, then, brings us to the quoted price of pounds 0.430 per Kg. which was accepted by the authorities. As has been pointed out, this price was quoted by Chance and Elmore to unknown Indian inquiries. Copies of letter written to Chance and the telegram sent to Elmore and the replies of Chance and Elmore have been furnished by the authorities to the appellants but in such a manner that the names of the inquirers are obscured.

23. It was submitted by Mr. Talyarkhan that unless the names of the inquiries were furnished and the inquirers were made available for cross-examination, it would not be possible to ascertain whether the price they were quoted was the appropriate price for the purposes of Section 14. This contention was raised before the authorities and before the learned single judge and was negatived. We

too are inclined to negative the contention, though we do not wish to be understood as saying that the name of the inquirer would in every case be irrelevant or his cross-examination of no value. Mr. Talyarkhan submitted that it was necessary here to have the inquirer's name to ascertain whether he was a competitor of the appellants and to cross-examine him to ascertain whether he had manoeuvred to obtain the quotation of a higher price from the manufacturer. The letters written by Chance and Elmore were available to the appellants. The appellants could have easily verified from Chance and Elmore whether the price quoted had been inflated. They might also have been able to find out who the inquiries were, having regard to their own statements about their relationship with Kupfer and, through Kupfer, with Chance. It does not, therefore, seem to us that the denial to the appellants of the names of the inquirers and the opportunity to cross-examine them has led to a situation where the correctness of the price quoted to the inquirers cannot be established. It would, of course, have been a very different matter if the names of the offerors had been concealed from the appellants.

24. It is also relevant in this context to mention that, as the Collector noted, the appellants had not been able to furnish the catalogue price of the said tubing.

25. In the circumstances, the authorities were justified in accepting the price of pounds 0.430 as the assessable value of the said tubing for the purposes of Section 14.

26. In the result, we uphold the learned single judge's findings insofar as they concern the under-valuation of the said tubing by the appellants.

27. We now deal with the charge that the appellants mis-declared the weight of the third consignment. The appellants accepted the fact that there had been such mis-declaration, but they pleaded, on the facts which they placed before the Collector, that it was an innocent mis-declaration for which no penalty should be visited upon them. The authorities should have applied their mind to this plea to consider, in the first place, whether penalty should at all be levied and, then, what its quantum should be. There was no application of mind to the plea by either the Collector or by the Board in appeal. The Central Government in revision observed only that the appellants had mis-declared the weight and thereby rendered themselves liable to penal action so that the imposition of the penalty was correct in law, considering the fact that due to the mis-declaration there would have been a loss of duty of about Rs. 27,000/-. Even the Central Government, therefore, did not apply its mind to the plea put forward by the appellants, supported by letters, that they had filed the bill of entry on the basis of the shipping documents which showed the lesser weight, that the consignment was found to be heavier in the course of inspection at the docks, that they had written to their suppliers for an explanation, that the explanation was that two consignments of the said tubing, one to the appellants in India and another to a party elsewhere, had been confusedly amalgamated; and that the suppliers had by their letter of explanation offered to take back the excess quantity at no cost

to the appellants.

28. The learned single judge accepted the position that the Collector had not specifically found that the appellants' explanation was unacceptable; but he felt that there was hardly any doubt that the collector was not inclined to accept the explanation because he had levied the penalty of Rs. 27,000/- for misdeclaration of weight. We are not inclined to agree with the learned judge. The Collector was obliged to write a speaking order. That speaking order had to show that he had applied his mind to all relevant aspects of the controversy before him. If his order did not show such application of mind, the court could not assume that he did apply his mind. If his order did not show such application of mind, the court must conclude that he did not apply his mind. If the court then finds it inappropriate to consider the controversy, it must remand the matter for consideration.

29. We are also unable to accept the learned judge's observation that the appellants had manoeuvred to secure the letter from Chance showing the price of the said tubing to be pounds 0.340. It was nobody's case that the letter had been manoeuvred and there was no evidence in that behalf. The observation casts an aspersion on Chance which, we feel, is unmerited. What is more, if Chance was maneuverable, the evidence, based on its letter, of the price of pounds 0.430 could also not have been easily accepted.

30. The learned judge found the appellants' explanation in regard to the misdeclaration of weight unacceptable because the appellants were "willing to produce false evidence" and it was "impossible to rely upon the statement of such person". We do not find material upon the record which bears out the finding about false evidence. We do not, therefore, subscribe to the finding that it was not possible to rely upon the appellants' statement in regard to their explanation about the misdeclaration of weight. We remand the matter to the Collector for reconsideration on this count.

31. In the result, we allow the appeal to this extent : that the order of the Collector dated 24th April, 1974, the order in appeal dated 16th January, 1978 and the order in revision dated 20th October, 1979 are quashed and set aside insofar as they relate to the charge of misdeclaration of weight. The matter is remanded to the Collector to consider the appellants' explanation in this regard. The Collector shall hear the appellants and shall then pass a speaking order. This shall be done within 8 weeks from today.

32. No order as to costs.